IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:17-cv-22209-GAYLES/OTAZO-REYES

MICHAEL VASQUEZ, *et al.*, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

GENERAL MOTORS, LLC,

Defendant.

Class Action

GENERAL MOTORS LLC'S MOTION AND MEMORANDUM IN SUPPORT TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT

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INTRODUCTION

This is a case by six sophisticated auto-enthusiasts who each purchased a Chevrolet Corvette Z06 at independent dealerships, and now claim that the car's performance was somehow inconsistent with their expectations, as well as GM's warranty and representations. Their sprawling Complaint alleges 117 separate causes of action, under the laws of all fifty states on behalf of fifty distinct putative statewide classes of Z06 purchasers and lessees, and a federal claim under the Magnuson Moss Warranty Act on behalf of a putative nationwide class. All 117 causes of actions are subject to dismissal under Fed. R. Civ. P. 12(b)(1), (2), (3), and (6), for lack of standing, and on multiple other grounds.

First, plaintiffs do not have standing to assert 95 state law claims (Counts 22 through 117) on behalf of 45 purported statewide classes in states where none of the named plaintiffs reside or purchased a vehicle. "[A] claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987).

Second, under *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco County*, 137 S. Ct. 1773 (2017), the Court lacks personal jurisdiction over GM on the claims of all named plaintiffs and putative class members who are not Florida residents.

Third, plaintiffs do not plead their fraudulent concealment claims (Counts 3, 7, 11, 15, 19, and 22) with the particularity required by Fed. R. Civ. P. 9(b) ("Rule 9(b)"). They also do not allege any direct relationship with GM establishing a duty to disclose. And the claims are barred by the economic loss doctrine in Florida, New Jersey, Texas, Pennsylvania, and West Virginia (the state laws applicable to the named plaintiffs).

Fourth, plaintiffs' claims under state consumer protection laws (Counts 2, 6, 10, 14, 18, and 23-71) should be dismissed because they do not plead any alleged misrepresentation, deceptive advertising, reliance, or causation with the particularity required by Rule 9(b), and they do not meet the substantive requirements of the applicable state laws.

Fifth, plaintiffs' state law warranty claims (Counts 4, 8, 12, 16, 20 and 117) should be dismissed because their design defect theory is not covered under GM's Limited Warranty for defects in "material or workmanship." Further, GM's advertising cannot provide a basis for plaintiffs' express warranty claims.

Sixth, plaintiffs' nationwide warranty claim under the MMWA (Count 1) fails because

there are no viable underlying state-law breach of warranty claims, and the alleged advertisements do not constitute a "written warranty" under that statute. Plaintiffs are also prohibited from bringing a class action under the MMWA because it expressly requires a minimum of 100 named plaintiffs. *See* 15 U.S.C. §§ 2310(d).

Finally, plaintiffs' unjust enrichment claims (Counts 5, 9, 13, 17, 21, and 72-116) fail because there is no such independent cause of action in Texas, New Jersey, and other states, and such claims are precluded by the existence of an express contract or an adequate remedy at law.[1]

STATEMENT OF FACTS

The Z06 has consistently been praised for its performance. Car and Driver Magazine has called it "the most amazing version of a sports car that is already amazing by anyone's measure"; Autoweek dubbed it "[a] supercar for half the price"; and Motor Trend informed its readers that the $80,000 base price "is bewildering, as you'd need to spend nearly $1 million elsewhere to reach Z06 performance."[2]

But the Z06 is not a race car, and like any vehicle it has limitations. Plaintiffs allege that the Z06 was designed to function optimally at an ambient temperature of no more than 86 degrees when operating at top speeds, design criteria GM has used "for generations." Compl. ¶ 74. Its performance, especially at top speeds, also depends heavily on the driver's skill and attention. The Z06 owner's manual gives detailed instructions for track driving. *Id*. ¶ 58. There is no allegation that any of these plaintiffs followed these instructions.

Plaintiffs are six individual consumers who each purchased a 2015 to 2017 model year Z06. Plaintiffs reside in four states: (1) Florida (Vazquez and Malone, *id*. ¶¶ 12, 17), (2) New Jersey (White, *id.* ¶ 23), (3) Pennsylvania (Nakel, *id.* ¶ 28), and (4) Texas (Blanks and Hamid, *id.* ¶ 33, ¶ 38). Each plaintiff alleges purchase in his state of residence,[3] except for Mr. Hamid, who alleges purchase in West Virginia. *Id.* ¶¶ 12, 17, 23, 28, 33, 38.

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[1] The attached chart shows the specific grounds for dismissal of the 117 causes of action, with cross-references to sections in this Memorandum. *See* Exhibit 1.

[2] http://www.caranddriver.com/chevrolet/corvette-z06; http://autoweek.com/article/car-reviews/2016-chevrolet-corvette-z06-drive-review-not-just-smoke-machine; http://www.motortrend.com/cars/chevrolet/corvette/2015/2015-chevrolet-corvette-z06-first-test-2/

[3] Mr. White purchased his vehicle over the telephone in New Jersey from an Illinois dealer, and the vehicle was delivered to New Jersey. Compl. ¶ 23.

The Complaint alleges that GM markets the Z06 as "track-proven," "track-focused," or "track ready," and that GM designed the Z06 with components for closed race track operation. *Id*. ¶¶ 50-61. Plaintiffs allege that, on unspecified dates, each of them saw unspecified print and online advertisements from unspecified sources showing the Z06 on a racing track and representing that "various components" of the Z06 were "track-proven." *Id*. ¶¶ 14, 19, 25, 30, 35, 40. Plaintiffs also allege that the Z06's owner's manual described the vehicle's "competitive driving mode" and provided instructions for driving on a track. *Id*. ¶¶ 57-58.

Plaintiffs allege that GM misrepresented the Z06's capability for closed track racing. *Id*. ¶ 70. Plaintiffs allege that the Z06 was improperly designed because, when raced on a closed track in high ambient temperature, engine overheating prevents the vehicle from sustaining maximum speeds. Plaintiffs allege the vehicle is designed to respond to overheating by entering "Limp Mode," a mode of operation that restricts vehicle power and operation to prevent engine damage. *Id*. ¶ 63. Before entering limp mode, the vehicle repeatedly alerts drivers of potential overheating so that the driver can take steps to allow the engine to cool down before resuming aggressive track driving. *Id* ¶¶ 63, 74.

The Complaint alleges that each plaintiff purchased his Corvette Z06 for use "on the road and on the track" and selected the Z06 "in part" because of the unspecified marketing or other materials indicating the vehicle was "track-proven." *Id*. ¶¶ 14-16, 19, 25-27, 30, 35-37, 40. Each plaintiff alleges he raced his Corvette Z06 on a closed track and experienced overheating and "Limp Mode," (*id*. ¶¶ 16, 21, 27, 37, 42), except for plaintiff Mr. Nakel who alleges that he "is concerned that the vehicle will overheat and go into Limp Mode if he drives it fast," and therefore "is not able to drive the vehicle the way he wants to." *Id*. ¶ 32.[4]

Plaintiffs allege that GM knew about this alleged "defect" but failed to disclose it in promotional material. *Id*. ¶¶ 14, 19, 25, 30, 35, 40, 70, 71-82. Plaintiffs purportedly quote a Corvette engineer, without alleging where or when the alleged statement appeared, saying that the Z06 is designed for racing at a maximum ambient temperature of 86 degrees, that the vehicle

[4] Plaintiffs' claims concern operation of the vehicles only on high speed race tracks, not on public highways. While making vague implications, the Complaint does not allege that any identified individual ever experienced "Limp Mode" while driving on the public highways. *See* Compl. ¶¶ 65-66. Plaintiffs also do not indicate whether they modified their vehicles for racing purposes, a highly common practice that voids the Z06's warranty.

"will give warnings" if "the maximum recommended temperatures are reached" and that "[a] cool-down lap or two will bring operating temperatures back to a reasonable level and aggressive track driving can be resumed." *Id*. ¶ 74. Plaintiffs do not allege that GM made any representation that the Z06 could be raced at excessive temperatures for extended periods of time. Nor do plaintiffs allege that they operated their vehicles in accordance with instructions provided in the owner's manuals. By contrast, their allegations that their vehicles went into "Limp Mode" demonstrate that they did not follow these instructions.

Plaintiffs allegedly (a) will need to incur unspecified out-of-pocket expenses for unspecified "repairs" to their vehicles (apparently through aftermarket modification (*id*. ¶ 67)), and (b) paid an unspecified "premium" for their cars. *Id*. ¶¶ 16, 22, 27, 32, 37, 42.

LEGAL STANDARD

Courts have subject matter jurisdiction to hear only actual cases or controversies. U.S. CONST. Art. III, § 2; *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). Where a plaintiff lacks standing, a case or controversy does not exist. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). Before considering the merits of a complaint, the court must first determine whether a plaintiff has standing to bring each individual cause of action. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005). The plaintiff bears the burden to demonstrate the court's subject matter jurisdiction, including standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

To survive a motion to dismiss for failure to state a claim, a complaint must set forth enough non-conclusory allegations to show that liability for the alleged conduct is not merely possible but plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although well-pleaded factual allegations are assumed to be true, the court need not accept as true "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts." *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 485 (11th Cir. 2015) (internal punctuation and citations omitted).

Claims arising from allegations of fraud, including fraudulent concealment and consumer protection statutes addressing fraudulent or deceptive conduct, must be pled with particularity, including facts identifying the who, what, when, where, and how of the allegedly fraudulent conduct. Fed. R. Civ. P. 9(b); *Librizzi v. Ocwen Loan Servicing, LLC*, 120 F. Supp. 3d 1368, 1381 (S.D. Fla. 2015).

ARGUMENT

I. PLAINTIFFS LACK STANDING WHERE NO PLAINTIFF LIVED OR PURCHASED A VEHICLE.

The six named plaintiffs reside in four states: (1) Florida (Vazquez and Malone), New Jersey (White), (3) Pennsylvania (Nakel), and (4) Texas (Blanks and Hamid). Compl. ¶¶ 12, 17, 23, 28, 33, 38. Each purchased his vehicle in his state of residence, except for Mr. Hamid, who purchased his vehicle in West Virginia. *Id.* ¶¶ 12, 17, 23, 28, 33, 38. The Complaint purports to assert claims on behalf of fifty distinct statewide classes under the laws of all fifty states.

Plaintiffs do not have standing to assert Counts 22 through 117, which raise claims under the laws of the forty-five states where none of them reside or made a vehicle purchase. *Griffin*, 823 F.2d at 1483 ("[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim"). Under clear precedent in this Court, "[a] named plaintiff lacks standing to assert legal claims on behalf of a putative class pursuant to state law under which the named plaintiff's own claims do not arise." *In re Takata Airbag Prod. Liab. Litig.*, No. 14-24009-CV, 2016 WL 1266609, at *4 (S.D. Fla. Mar. 11, 2016) (internal citation omitted); *see also In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365 at 1370-71 (S.D. Fla. 2001) ("[T]he named plaintiffs cannot rely on unidentified persons within those states to state a claim for relief").

II. THE COURT LACKS PERSONAL JURISDICTION OVER GM ON THE CLAIMS OF NON-FLORIDA RESIDENTS.

Only two named plaintiffs, Mr. Vazquez and Mr. Malone, are Florida residents. Along with four non-Florida residents, they seek to represent a nationwide class and fifty separate state-wide classes of purchasers and lessees in all fifty states. Because the claims of these non-Florida plaintiffs and putative class members lack any connection to Florida, the Court does not have personal jurisdiction over GM as to those claims.

To establish personal jurisdiction over GM, plaintiffs must allege facts demonstrating that GM's contacts with Florida are sufficient to satisfy both Florida's Long-Arm Statute, Fla. Stat. § 48.193, and the Due Process Clause of the Fifth Amendment. *See Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1319 (11th Cir. 2004). "[T]he issue of whether personal jurisdiction is present is a question of law" that courts must resolve on a claim-by-claim basis. *See Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009).

Plaintiffs plead no facts suggesting this Court can exercise personal jurisdiction over GM

for the claims of non-Florida residents. *See Ramirez v. Grp. Servs., Inc.*, No. 616CV1831ORL37, 2017 WL 2672555, at *2 (M.D. Fla. June 21, 2017) ("When a plaintiff fails to include sufficient allegations in his complaint to establish a prima facie case of personal jurisdiction, a defendant may assert a facial challenge to the complaint under Federal Rule of Civil Procedure 12(b)(2)").

GM is not subject to general jurisdiction in Florida. In *Daimler AG v. Bauman*, the Supreme Court clarified that courts may not exercise general jurisdiction over a corporate defendant except in its state of incorporation or its principal place of business. 134 S. Ct. 746, 760 (2013). Plaintiffs recognize that GM is incorporated in Delaware and has its principal place of business in Michigan. Compl. ¶ 43.

Plaintiffs also do not allege facts supporting the exercise of specific jurisdiction over GM as to the claims of non-Florida residents who did not purchase their vehicles or suffer any harm in Florida. In *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773 (2017), the Supreme Court reaffirmed that due process limits a court's exercise of personal jurisdiction over a non-resident defendant not subject to general jurisdiction in the state. The Court started with the "settled principle" that "for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally [an] activity or an occurrence that takes place in the forum State,'" and rejected the California Supreme Court's attempt to expand specific jurisdiction to claims by out-of-state plaintiffs against out-of-state defendants on the basis that the claims are "similar in several ways to the claims of the California residents." *Id.* at 1779-1781 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).[5]

The Complaint in this case raises the same jurisdictional issue presented in *Bristol-Meyers*. Specific jurisdiction is absent with respect to the claims of Plaintiffs White, Nakel, Blanks, and Hamid, and the putative class members residing outside Florida who did not

[5] *Bristol-Myers* addressed claims brought in state court, and the Supreme Court "le[ft] open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Bristol-Myers*, 137 S. Ct. at 1783-84. Numerous federal courts, including courts in the Eleventh Circuit, have since applied the Court's holdings to federal cases. *See Andrew v. Radiancy, Inc.*, No. 6:16 CV 1061-ORL-37GJK, 2017 WL 2692840, at *6-7 (M.D. Fla. June 22, 2017); *Ferrari v. Mercedes Benz USA, LLC*, No. 17-CV-00018-YGR, 2017 WL 3115198, at *2 (N.D. Cal. July 21, 2017); *Jordan v. Bayer Corp.*, No. 4:17-CV-865 (CEJ), 2017 WL 3006993, at *4 (E.D. Mo. July 14, 2017).

purchase their vehicles in Florida and do not allege any connection between this Florida forum and their claims. It is not enough that a manufacturer sells or advertises its product in the forum state if the plaintiff asserting the claim did not purchase or use the product there. *Goodyear*, 564 U.S. at 931 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales"). It is also not enough that "third parties (here, the plaintiffs who reside in [Florida]) can bring claims similar to those brought by the nonresidents." *Bristol-Myers*, 137 S. Ct. at 1781.

Each plaintiff must demonstrate that his or her claim is sufficiently connected to Florida to support personal jurisdiction over GM. Because non-Florida plaintiffs "do not claim to have suffered harm in [Florida]" and "the conduct giving rise to the nonresidents claims occurred elsewhere…[i]t follows that the [Florida] courts cannot claim specific jurisdiction." *Id*. at 1782; *see also Spratley v. FCA US LLC*, No. 317CV0062MADDEP, 2017 WL 4023348, at *7 (N.D.N.Y. Sept. 12, 2017) (applying *Bristol-Myers* and dismissing claims by out-of-state plaintiffs in putative class action); *Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*, No. CV 16-665, 2017 WL 3129147, at *9 (E.D. Pa. July 24, 2017) (dismissing out-of-state class claims that "do not arise out of or relate to any of Selling Defendants' conduct within the forum state"). Counts 6 through 117 should be dismissed for lack of personal jurisdiction.

III. PLAINTIFFS' FRAUDULENT CONCEALMENT CLAIMS FAIL ON MULTIPLE GROUNDS.

To state a fraudulent concealment claim, plaintiffs must allege, with the particularity required by Rule 9(b), that GM omitted a material fact that it had a duty to disclose, and that plaintiffs relied on that omission to their detriment. *See*, *e.g.*, *Aprigliano v. Am. Honda Motor Co.*, 979 F. Supp. 2d 1331, 1342 (S.D. Fla. 2013). Plaintiffs fall short on these requirements.

A. Plaintiffs Do Not Plead Fraudulent Concealment With The Particularity Required By Rule 9(b).

Rule 9(b)'s "clear intent is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed." *Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985). To sufficiently plead a fraud claim, a complaint must set forth:

> (1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff, and; (4) what the defendant obtained as a consequence of the fraud.

In re Galectin Therapeutics, Inc. Secs. Litig., 843 F.3d 1257, 1269 (11th Cir. 2016) (internal citations and punctuation omitted). These heightened pleading requirements prevent plaintiffs from "needlessly harm[ing] a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and at worst [premised on] baseless allegations used to extract settlements." *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006) (internal citations omitted). Rule 9(b) requires that plaintiffs plead, with particularity, the "who, what, when, where, and how of the allegedly false statements." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008).

Plaintiffs' Complaint does not meet these requirements. Plaintiffs do not identify what specific facts GM allegedly misrepresented or omitted about the Z06's track performance capability, when or where GM misrepresented or omitted those facts, or why GM had a duty to disclose them. They also do not say when or where each plaintiff allegedly encountered any misrepresentation or omission by GM, how any plaintiff was misled, or what GM gained as a result. Instead, five plaintiffs simply make the same vague allegation that "the Corvette Z06 was represented to be 'track-proven' and 'the most capable track-Corvette' ever produced" in unspecified "print and online advertisements" on unspecified dates. Compl. ¶ 14 (Vasquez), ¶ 25 (White), ¶ 30 (Nakel), ¶ 35 (Blanks), ¶ 40 (Hamid). Plaintiff Malone adds the allegation that "the Corvette Z06 was represented to be a track car and was marketed as GM's iconic race car within the family" in unspecified "print and online advertisements" on unspecified dates. Compl. ¶ 19.

Such vague allegations do not "identify with the requisite particularity the misrepresentations and/or concealments that were actually relied upon" or their "date, time or place." *See Hinkle v. Cont'l Motors, Inc.*, No. 8:16-cv-2966-T-36MAP, 2017 WL 3131465, at *6 (M.D. Fla. July 24, 2017); *Ray v. Spirit Airlines, Inc.*, No. 12-61528-Civ-Scola, 2015 WL 11143079, at *5 (S.D. Fla. June 4, 2015), *aff'd on other grounds*, 836 F.3d 1340 (11th Cir. 2016) (plaintiff failed to plead "where she saw [the product] advertised" or "when she visited the [defendant's] website"); *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-CIV, 2012 WL 2049431, at *7 (S.D. Fla. June 5, 2012) ("[plaintiff] does not particularly identify the timing of any of the alleged misrepresentations" and "[m]erely saying that Celebrity's alleged false

statements were made '[d]uring the cruise,'… does not satisfy Rule 9(b)").[6]

B. Plaintiffs Do Not Allege GM Has A Duty To Disclose.

Each Plaintiff purchased his vehicle from an independent dealership. Plaintiffs thus cannot allege a duty to disclose because they did not have, and do not allege, any direct relationship with GM.[7] While different factual scenarios can create a duty to disclose, "the common thread running through each scenario which gives rise to [this] duty… is that both the plaintiff and the defendant must have been parties to a transaction or must have had some kind of preexisting fiduciary relationship." *In re Palm Beach Fin. Partners, L.P.*, 517 B.R. 310, 335 (Bankr. S.D. Fla. 2013); *see also see also Taylor v. Am. Honda Motor Co., Inc*., 555 F.Supp. 59, (M.D. Fla. 1982) ("No Florida case has gone so far as to impose upon merchants a duty to disclose information to the public at large, and this Court declines to do so today").

For this reason, courts refuse to impose a duty to disclose on automobile manufacturers for individual consumers who purchased vehicles through independent dealerships. *See*, *e.g. Coba v. Ford Motor Co.*, No. 12-1622 (DRD), 2013 WL 244687, at *12 (D.N.J. Jan. 22, 2013) (finding "no special relationship between individual consumers and automobile manufacturers that would impose a duty to disclose on the manufacturers"); *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146 (DMC)(JAD), 2010 WL 2925913, at *12 (D.N.J. July 21, 2010) (same); *Rivera v. Ford Motor Co.*, No. 16-CV-13786, 2017 WL 3485815, at *7 (E.D. Mich. Aug. 15, 2017) (plaintiff failed to "allege[] a duty to disclose the alleged defective purge valve under

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[6] The Complaint also purports to quote from a GM brochure, press kit, and owners' manual (Compl. ¶¶ 54-61), but never alleges that any plaintiff actually saw, read, or relied on any specific statement in any specific materials. Fraud-based claims cannot survive where "no plaintiff alleged reliance on any of the specific material quoted in the Complaint." *Belville v. Ford Motor Co.*, 13 F. Supp. 3d 528, 545 (S.D.W. Va. 2014).

[7] While state laws vary, a duty to disclose generally requires the existence of a fiduciary or other special relationship between the parties. *See, e.g. Green v. G.M.C.*, 2003 WL 21730592, at *8 (N.J. Super. Ct. App. Div. July 10, 2003) (finding no duty to disclose "since no fiduciary or implied fiduciary relationship existed between plaintiffs and the manufacturers of their cars"); *Matter of Estate of Evasew*, 526 Pa. 98, 105, (1990) (duty to disclose arises where defendant "stands in a fiduciary relationship to the party seeking disclosure"); *TransPetrol, Ltd. v. Radulovic*, 764 So.2d 878, 879 (Fla. Dist. Ct. App. 2000) (duty to disclose arises where a fiduciary or "other relation of trust or confidence" exists); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) ("Generally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship").

either Florida or Michigan law").

Instead of alleging facts establishing a disclosure duty by GM, plaintiffs rely on conclusory allegations that GM had "exclusive knowledge" that the Z06 "did not perform as advertised"; GM "intentionally concealed" the alleged defects; and GM "made incomplete representations about the safety and performance of the Z06s." *See, e.g.*, Compl. ¶¶ 123. But plaintiffs never identify what information was "intentionally concealed," who at GM was purportedly aware of any concealed facts, the source of that knowledge, or any specific actions GM took to conceal the facts from plaintiffs. Courts "will not consider [p]laintiffs' legal conclusion of duty to be true without any factual allegations to support such a conclusion." *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, No. MDL 1718, 2007 WL 2421480, at *8 (E.D. Mich. Aug. 24, 2007) (dismissing fraudulent omission claims) *see also Kampuries v. Am. Honda Motor Co.*, 204 F. Supp. 3d 484, 493 (E.D.N.Y. 2016) ("conclusory assertion that defendants knew about defects in the airbags since 2000, but 'concealed from or failed to notify [him] and the public'" are "insufficient to make out a claim for fraudulent concealment"); *Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d 1161, 1176 (E.D. Cal. 2013) ("conclusory assertion that Defendants 'actively concealed material facts from Plaintiff and the Class'" deemed insufficient).

C. The Economic Loss Doctrine Bars Fraudulent Concealment Claims In Florida, New Jersey, Texas, Pennsylvania, And West Virginia.

In addition to these pleading deficiencies, the economic loss doctrine precludes the named plaintiffs' fraudulent concealment claims (Counts 3, 7, 11, 15, and 19). The economic loss doctrine prohibits plaintiffs from pursuing tort claims where the only damages suffered are economic losses. *See Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So.3d 399, 401 (Fla. 2013). Economic loss includes damages for "inadequate value" as well as "costs of repair and replacement of the defective product." *Id.*

The economic loss doctrine applies in each of the five states where the named plaintiffs' claims arise. *See In re Takata Airbag Prods. Liab. Litig.*, 193 F. Supp. 3d 1324, 1338-42 (S.D. Fla. 2016) (Florida and Pennsylvania); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680-81 (3d Cir. 2002) (Pennsylvania); *Alloway v. Gen. Marine Indus., L.P.*, 149 N.J. 620, 642 (1997) (New Jersey); *Ibe v. Jones*, 836 F.3d 516, 526 (5th Cir. 2016) (Texas); *Basham v. Gen. Shale*, 180 W. Va. 526, 530 (1988) (West Virginia).

Here, plaintiffs' sole alleged damages are economic losses. They allege no personal

injury or property damage, and expressly exclude from the purported classes "individuals who have personal injury claims." Compl. ¶ 90. Removing any doubt, plaintiffs label the section of their Complaint addressing their alleged damages "The Economic Consequences Associated with the Defect." Compl. ¶ 67.[8]

IV. PLAINTIFFS DO NOT STATE CLAIMS FOR VIOLATION OF STATE CONSUMER PROTECTION STATUTES.

A. Plaintiffs Do Not Plead Their Consumer Protection Claims With The Particularity Required By Rule 9(b).

Plaintiffs' consumer protection claims do not meet the heightened pleading standard of Rule 9(b), which applies with equal force to alleged violations of state consumer protection statutes based on fraudulent or deceptive conduct. *See, e.g., Llado-Carreno v. Guidant Corp.*, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (FDUTPA); *Lieberson v. Johnson & Johnson Consumer Cos.*, 865 F. Supp. 2d 529, 538-39 (D.N.J. 2011) (NJCFA); *Dolan v. PHL Variable Ins. Co.*, No. CV 3:15-cv-01987, 2016 WL 6879622, at *5-6 (M.D. Pa. Nov. 22, 2016) (UTPCPL); *SHS Inv. v. Nationwide Mut. Ins. Co.*, 798 F. Supp. 2d 811, 820 (S.D. Tex. 2011) (DTPA); *Stanley v. Huntington Nat'l Bank*, No. 1:11-CV-54, 2012 WL 254135, at *7 (N.D.W. Va. Jan. 27, 2012), *aff'd* 492 F. App'x 456 (4th Cir. 2012) (WVCCPA).

Under each of the relevant state statutes, plaintiffs are required to "plead facts from which we might infer that the [defendant's] representations . . . were false, deceptive, or misleading." *In re GNC Corp.*, 789 F.3d 505, 513 (4th Cir. 2015) (addressing, *inter alia*, consumer protection statutes in Florida, New Jersey, and Pennsylvania). The alleged false or misleading statements must be "identified with particularity," and plaintiffs must "plead with specificity the allegedly deceptive acts or practices that form the basis" of their claims. *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 665-66 (E.D. Mich. 2011) (dismissing claims under Florida, Michigan, and New York consumer fraud statutes).

Plaintiffs do not allege what specific GM advertisements or statements they relied upon,

[8] Plaintiffs also assert in Count 22 a claim for "Fraud by Concealment for Remaining States." This Count purports to assert a fraudulent concealment claim "on behalf of residents" of, and under the laws of, 45 different states. Compl. ¶ 391. This claim is subject to dismissal for the other reasons in this section, and also because it is improper "shotgun pleading." *Novak v. Cobb Cnty. Kennestone Hosp. Auth.*, 74 F.3d 1173, 1175 & n.5 (11th Cir. 1996) (a complaint that pleaded multiple causes of action in a single count is "a quintessential 'shotgun pleading'").

when they relied upon them, and/or how those advertisements or statements were fraudulent or caused them injury. These are essential facts, and without them, these claims cannot stand. *See*, *e.g. D.H.G. Properties, LLC v. Ginn Companies*, *LLC*, No. 3:09-CV-735-J-34JRK, 2010 WL 5584464, at *6 (M.D. Fla. Sept. 28, 2010) (dismissing consumer protection law claim where complaint contained "many generalized allegations regarding the overall fraudulent scheme" but "very few allegations actually purport to describe facts or events relating to Plaintiff, or Plaintiff's purchase of the property at issue"); *In re Ford*, 2007 WL 2421480, at *9 ("Plaintiffs fail to identify the representation(s) made by Ford… on which they allegedly relied with any specificity" and "do not allege where or when Ford made the alleged misrepresentations"); *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 222-28 (3d Cir. 2008) (plaintiffs failed to adequately plead "justifiable reliance" in addition to "a causal connection between the misrepresentation and the harm"); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693-94 (Tex. 2002) (reliance is a necessary element of "fraud… negligent misrepresentation… and DTPA"); *White v. Wyeth*, 705 S.E.2d 828, 837 (W. Va.) (plaintiffs must plead "causal connection between the deceptive conduct and the loss" as well as "proof of reliance"); *Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007) ("[A] plaintiff must allege that the defendant engaged in an unlawful practice that caused an ascertainable loss to the plaintiff").[9]

[9] *See also Kuehn v. Stanley*, 208 Ariz. 124, 129 (Ct. App. 2004); *Doe v. Successfulmatch.com*, No. 13-CV-03376-LHK, 2014 WL 1494347, at *4 (N.D. Cal. Apr. 16, 2014); *Donna v. Countrywide Mortg.*, No. 14-CV-03515-CBS, 2015 WL 9456325, at *4 (D. Colo. Dec. 28, 2015); *Aviamax Aviation Ltd. v. Bombardier Aerospace Corp.*, 2010 WL 1882316, at *9 (D. Conn. May 10, 2010); *Eames v. Nationwide Mut. Ins. Co.*, 412 F. Supp. 2d 431, 438 (D. Del. 2006); *Tuttle v. Treasure Valley Marine, Inc.*, No. 1:15-CV-00314-BLW, 2016 WL 3198230, at *2 (D. Idaho June 8, 2016); *Sweiss v. Ramadani*, No. 15-CV-8150, 2016 WL 492370, at *6 (N.D. Ill. Feb. 9, 2016); *Hollon v. Consumer Plumbing Recovery Ctr.*, No. CIV.A. 5:05-414-JMH, 2006 WL 839227, at *3 (E.D. Ky. Mar. 2, 2006); *Rojas-Roberts v. Ocwen Loan Servicing, LLC*, 2015 WL 5047494, at *6 (D. Md. Aug. 25, 2015); *Rosipko v. FCA US, LLC*, No. 15-11030, 2015 WL 8007649, at *4 (E.D. Mich. Dec. 7, 2015); *Thunander v. Uponor, Inc.*, 887 F. Supp. 2d 850, 876 (D. Minn. 2012); *Mattingly v. Medtronic, Inc.*, 466 F. Supp. 2d 1170, 1173-74 (E.D. Mo. 2006); *Myers v. BAC Home Loans Servicing, LP*, No. CV 13-53-M-DWM-JCL, 2013 WL 6231715, at *10–11 (D. Mont. Dec. 2, 2013); *Shlesinger v. Bank of Am., N.A.*, 2012 WL 2995698, at *6 (D. Nev. July 23, 2012); *Nixon v. Alan Vester Auto Grp., Inc.*, No. 1:07 CV 839, 2008 WL 4544369, at *4 (M.D.N.C. Oct. 8, 2008); *Ferron v. Zoomego*, Inc., No. 206-CV-751, 2007 WL 1974946, at *3 (S.D. Ohio July 3, 2007), *aff'd*, 276 F. App'x 473 (6th Cir. 2008); *Sony/ATV Music Pub'g LLC, et al., v. 1729172 Ontario, Inc., et al.*, No. 3:14-CV-1929, 2016 WL 4239920, at *3 (M.D. Tenn. Aug. 11, 2016); *Goodwin v. Hole No. 4, No. 2*:06-CV-00679,

(Continued...)

B. Plaintiffs' Statutory Consumer Protection Claims Do Not Meet State Law Requirements.

1. Alabama, Georgia, Louisiana, South Carolina, Tennessee And Virginia Prohibit Consumer Class Actions.

Alabama, Georgia, Louisiana, South Carolina, Tennessee, and Virginia preclude consumer class actions for alleged violations of their consumer protection statutes. *See King v. Va. Birth-Related Neurological Injury Comp. Program*, 22 Va. Cir. 156, 159 (Va. Cir. Ct. 1990) (holding that Virginia law precludes class actions unless expressly authorized by statute); Ga. Code Ann. § 10-1-399(a); Ala. Code § 8-19-10(f); La. Rev. Stat. § 51:1405; S.C. Code Ann, § 39-5-140; *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008) (statutory language precludes class actions under the TCPA). Courts routinely dismiss state consumer protection claims pled as class actions on this ground. *See*, *e.g.*, *Arcand v. Brother Int'l* Corp., 673 F. Supp. 2d 282, 294 (D.N.J. 2009) (Virginia law); *Honig v. Comcast of Georgia I, LLC*, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) ("GFBPA expressly prohibits consumers class actions ... by its very terms"); *Suffern v. Countrywide Home Loans, Inc.*, No. CIV.A. 06-0358, 2006 WL 1999204, at *2 (E.D. La. July 14, 2006). Therefore, Counts 23, 33, 42, 63, 65, and 68 are not cognizable class claims as a matter of law.

2. Kentucky and Idaho Require Privity.

Plaintiffs' consumer protection claims under Kentucky and Idaho law (Counts 36 and 41) are also deficient because those statutes apply only to claims between a plaintiff and a defendant in privity. *See* 815 ILCS 505/2; *Kerr v. ReconTrust Co. N.A.*, No. 41670, 2014 WL 6674273, at *3 (Idaho Ct. App. Nov. 25, 2014); Ky. Rev. Stat. § 367.220; *Williams v. Chase Bank USA, N.A.*, 390 S.W.3d 824, 829–30 (Ky. Ct. App. 2012). Plaintiffs do not allege privity with GM, and instead allege they purchased their vehicles from independent dealers. Therefore, Counts 36 and 41 are also subject to dismissal for failure to plead the existence of privity with GM.

3. Ohio's Consumer Sales Practices Act Requires Statutory Notice.

Plaintiffs cannot pursue a class action under Ohio's Consumers Sales Practice Act because they do not allege that GM "had prior notice that its conduct was 'deceptive or

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2006 WL 3327990, at *7 (D. Utah Nov. 15, 2006); *Murphy v. Capella Educ. Co.*, 589 F. App'x 646, 657 (4th Cir. 2014); *Fid. Morg. Corp. v. Seattle Times Co.*, 213 F.R.D. 573, 575 (W.D. Wash. 2003); *Miller v. Vonage Am., Inc.*, No. 14-CV-379, 2015 WL 59361, at *5 (E.D. Wis. Jan. 5, 2015).

unconscionable,'" as required by the Act (Ohio Rev. Code §§ 1345.01, et seq.). *Pattie v. Coach, Inc*., 29 F. Supp. 3d 1051, 1055 (N.D. Ohio 2014) (citing O.R.C. § 1345.09(B)). To establish prior notice, "plaintiff[s] must allege either that 'a specific rule or regulation has been promulgated [by the Ohio Attorney General] under R.C. 1345.05 that specifically characterizes the challenged practice as unfair or deceptive,' or that 'an Ohio state court has found the specific practice either unconscionable or deceptive in a decision open to public inspection." *Id*. (internal citation and punctuation omitted). Plaintiffs do not and cannot identify the requisite prior judicial decision or administrative ruling to support Count 59.

V. PLAINTIFFS DO NOT PLEAD VIABLE STATE WARRANTY CLAIMS.

A. GM's Limited Warranty Does Not Cover The Alleged Defect.

Plaintiffs premise their express warranty claims (Counts 4, 8, 12, 16, 20, and 117) on an alleged breach of GM's New Vehicle Limited Warranty. See, e.g. Compl. ¶¶ 83, 85, 158. It is not clear that plaintiffs articulate any defect at all; at most, their theory appears to rest on a design defect. But such a design defect is not covered under GM's Limited Warranty against defects in "material or workmanship" (Compl. ¶ 85).

There are two distinct categories of product defects: manufacturing defects (materials and workmanship) and design defects. "'[A manufacturing] defect is often demonstrated by showing the product performed differently from other ostensibly identical units of the same product line….'" *Sater v. Chrysler Grp. LLC*, 2015 WL 736273, at *12 (C.D. Cal. Feb. 20, 2015) (quoting *McCabe v. Am. Honda Motor Co.*, 100 Cal.App. 4th 1111, 1120 (2002)). "'A design defect, in contrast, exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective.'" *Id*. (emphasis added).

Plaintiffs do not allege that any specific component of any specific vehicle failed to perform as designed. Rather, plaintiffs say that GM should have designed the Z06 differently so that it could sustain maximum speeds on track for longer periods of time and at higher ambient temperatures, and that all of the putative class members' vehicles share this same alleged "design defect." Compl. ¶ 106. Where a defect is alleged to exist in all vehicles, "not merely the particular vehicle owned by the [plaintiff]," the claim "concerns an alleged defect in design." *Gertz v. ToyotaMotor Corp.*, 2011 WL 3681647, *10 (C.D. Cal. Aug. 22, 2011).

GM's limited "material or workmanship" warranty is not triggered by plaintiffs' design

defect allegations. *See, e.g., Barakezyan*, 2016 WL 2840803, at *6-7; *Clark v. LG Elecs. U.S.A., Inc.*, 2013 WL 5816410, at *7 (S.D. Cal. Oct. 29, 2013) ("'an express warranty covering materials and workmanship does not include design defects'") (citations omitted); *Orthoflex, Inc. v. Thermotek, Inc.*, 2013 WL 4045206, at *8 (N.D. Tex. Aug. 9, 2013) (defendant "correctly argues that it warranted that its products would be free from defects in material and workmanship…[which] does not cover design defects"); *GT & MC, Inc. v. Tex. City Ref.*, Inc., 822 S.W.2d 252, 257 (Tex. App. 1991) (agreement limiting recovery for defects in materials or workmanship does not include design defects); *Whitt v. Mazda Motor of Am., Inc.*, 2011 WL 2520147 (Ohio Ct. App. 2011) (vehicle warranty provided against "defects in material or workmanship" "did not cover claims of design defects").[10]

B. GM's Advertising is Not a Warranty.

To the extent plaintiffs rely on GM's advertising for their express warranty claims, those claims fail for several reasons. First, the Complaint does not "identify any specific promise, affirmation, description or sample which might form the basis of the express warranty." *Baker v. APP Pharm., LLC,* 2010 WL 4941454, at *4 (D.N.J. Nov. 30, 2010).

Further, under the law of each relevant state, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise ...." Fla. Stat. Ann. § 672.313; N.J.S.A. 12A:2-313 (same); 13 Pa.C.S.A. § 2313 (same); V.T.C.A., Bus. & C. § 2.313 (same); W. Va. Code, § 46-2-313 (same); Cal. Civ. Code § 1791.2 (express warranties include "[a] written statement" in which the "manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good").

On the other hand, non-factual statements or statements "purporting to be merely the seller's opinion or commendation of the goods do[] not create a warranty." Fla. Stat. Ann. § 672.313; N.J.S.A. 12A:2-313 (same); 13 Pa.C.S.A. § 2313 (same); V.T.C.A., Bus. & C. § 2.313 (same); W. Va. Code, § 46-2-313 (same); Cal.Civ.Code § 1791.2 (same). To form the basis of an express warranty, the statement must be "specific and unequivocal;" "[v]ague statements" regarding "reliability," "safety," and "fitness for use" that "say nothing about the specific

[10] While plaintiffs insert a conclusory allegation that the Z06 "contain[s] a manufacturing defect" because it is not equipped with additional cooling equipment available through aftermarket modification (Compl. ¶ 64), this is simply a repackaging of the same design defect claim.

characteristics or components" of a product are not actionable express warranties. *Smith v. LG Elecs. U.S.A., Inc.*, No. C 13-4361 PJH, 2014 WL 989742, at *5-6 (N.D. Cal. Mar. 11, 2014).

Plaintiffs cannot base their express warranty claims on statements in unspecified GM advertisements describing the Z06 as "track-proven," "track-focused," or "track ready." Such statements "cannot be quantified, as [they are] completely subjective to each individual rider. Consequently, these representations cannot form the basis of an express warranty . . . ." *Aprigliano*, 979 F. Supp. 2d at 1341; *see also Henderson,* 2010 WL 2925913, at *5 ("[g]eneral statements made about a car's quality may amount to mere puffery" and cannot be deemed factual representations); *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *10 (S.D.N.Y. July 15, 2016) ("general statements about a brand's quality, or a product's safety, are too vague or lacking in factual content to be actionable").

GM's advertising of the Z06 as "track-proven" is "extremely general, [and] not directed at any specific attribute of [GM] vehicles." *Warner v. Ford Motor Co.*, 2008 WL 4452338, at *9 (D. Colo. Sept. 30, 2008). This "track-proven" advertising does not describe the specific capability of any Z06 component nor is it a guarantee of specific performance levels on all tracks with all drivers under all conditions. *See Barakezyan v. BMW of N. Am., LLC,* No. CV1600173SJOGJSX, 2016 WL 2840803, at *6 (C.D. Cal. Apr. 7, 2016) (statements that vehicles "make a stunning impression on the track and the road," and are "[r]uthlessly sophisticated" are insufficiently definite to constitute express warranties); *see also Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1485 (D. Kan.), *aff'd*, 43 F.3d 1484 (10th Cir. 1994) (GMC statement "[t]hat it uses 'computer modeling and laboratory tests'" is "hardly the same as expressly warranting that its seat belts will perform without malfunction over the useful life of the automobile"). Courts regularly reject efforts to convert "[g]eneralized and vague statements of product superiority" into express warranties. *See, e.g.*, *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *16 (N.D. Cal. June 5, 2009) (dismissing claim based on puffery); *In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1531 (E.D. Mo. 1997) (dismissing breach of express warranty and fraudulent misrepresentation claims based on statements that a braking system was "safe and reliable").

VI. PLAINTIFFS DO NOT PLEAD A VIABLE CLAIM UNDER THE MAGNUSON-MOSS WARRANTY ACT.

A. Plaintiffs' MMWA Claim Falls With Their State Warranty Claims.

The Eleventh Circuit recognizes that MMWA claims are "identical" to state statutory

warranty claims. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1231 (11th Cir. 2016) (citing *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir. 1986)). Claims predicated on the MMWA therefore "stand or fall with [plaintiffs'] express and implied warranty claims under state law." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008); *Bailey v. Monaco Coach Corp.*, 168 Fed. App'x 893, 893 n.1 (11th Cir. 2006) (MMWA claims "arise out of and are defined by state law"); *Pearson v. Winnebago Indus., Inc.*, No5:15-CV-43-OC-PRL, 2016 WL 6893937 (M.D. Fla. Nov. 23, 2016) ("[A] federal court applies state law to Magnuson-Moss claims for breach of written and implied warranties").

Plaintiffs premise their MMWA claim on the same theory as their state law warranty claims, not any separate obligation created by federal law. As a result, their MMWA claim (Count 1) fails with their state warranty claims. *See David v. Am. Suzuki Motor Corp.*, 629 F. Supp. 2d 1309, 1324 (S.D. Fla. 2009) (dismissing MMWA claim where implied warranty claim failed under Florida law); *Stevenson v. Mazda Motor of Am., Inc.*, No. 14-5252 FLW DEA, 2015 WL 3487756, at *14 (D.N.J. June 2, 2015) (dismissing MMWA claim based on insufficiently pled state law warranty claims).

B. GM's Advertising Is Not A Basis For An MMWA Claim.

To the extent plaintiffs are attempting to circumvent the terms of GM's Limited Warranty and allege a warranty based on statements in GM advertisements, that claim also fails because the statements cited by Plaintiff do not constitute a "written warranty" under the MMWA. The MMWA narrowly defines "written warranty" as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.

15 U.S.C. § 2301(6).

GM advertisements describing the Z06 as "track-proven," "track-focused," or "track ready" do not meet this definition of "written warranty" because they neither promise a defect-

free product, nor guarantee a level of performance over a specific time period. At most, these are "product descriptions," not guarantees of specific performance levels. *See, e.g., Aprigliano,* 979 F. Supp. 2d at 1341 (manufacturer's statements that a motorcycle was "in a class of its own" and "the world's ultimate touring motorcycle" were "boastful statements of opinion and sales talk," and "merely aspirational goals and not statements of fact"); *Skelton v. GM Corp.*, 660 F.2d 311, 316 n. 7 (7th Cir. 1981) ("A product information disclosure without a specified time period to which the disclosure relates is ... not a written warranty"); *Kelley v. Microsoft Corp.*, 2007 WL 2600841 (W.D. Wash. Sept .10, 2007) (dismissing MMWA claim because "Windows Vista Capable" stickers lack "temporal element" required to constitute a warranty); *See also* Dee Pridgen and Richard M. Alderman, *Magnuson-Moss—Written warranty*, Consumer Protection and the Law § 14:7 (Westlaw 2016) ("[A] mere description of a consumer product (i.e., that a car would have a particular type of transmission) would not be a Magnuson-Moss written warranty because it does not promise the product is defect-free nor does it promise a certain level of performance for a specified period of time").

Such statements do not satisfy the definition of "written warranty" under the MMWA because they do not promise refund, repair, or replacement if the product fails to meet specifications. *Semitekol v. Monaco Coach Corp.*, 582 F. Supp. 2d 1009, 1027–28 (N.D. Ill. 2008) (rejecting MMWA claim where no promise of refund or repair).

C. Plaintiffs Do Not Satisfy the Statutory Prerequisites For a Class Action Under the MMWA.

Plaintiffs may pursue a MMWA claim on a class-wide basis only if the Complaint satisfies the statute's "express jurisdictional prerequisites for doing so." *Borchardt v. Mako Marine Int'l, Inc.*, No. 08-61199-CIV, 2011 WL 4636799, *2 (S.D. Fla. Oct. 6, 2011). To maintain a class action under the MMWA, a complaint must be brought by a minimum of 100 named plaintiffs. 15 U.S.C. § 2310(d)(3)(C). With only six named plaintiffs, "the purported class action is not cognizable in this court under Magnuson–Moss[.]" *Borchardt*, 2011 WL 4636799, *2 (dismissing statewide class claim under the MMWA for lack of subject-matter jurisdiction).

VII. PLAINTIFFS DO NOT PLEAD VIABLE UNJUST ENRICHMENT CLAIMS.

Plaintiffs attempt to plead claims for unjust enrichment under the laws of all fifty states. Unjust enrichment is not an independent cause of action in Texas, New Jersey, and a number of

other jurisdictions, and therefore those claims should be dismissed.[11]

For states where unjust enrichment is a cause of action, plaintiffs' claims should be dismissed because applicable state law prohibits unjust enrichment recovery where an express contract governs the dispute. This principle applies in each state governing the named plaintiffs' claims, and many others. *Zarrella v. Pac. Life Ins. Co.*, 755 F. Supp. 2d 1218, 1227 (S.D. Fla. 2010) ("No cause of action in unjust enrichment can exist where the parties' relationship is governed by an express contract."); *MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F. Supp. 2d 729, 734 (D.N.J. 2008) (unjust enrichment "cannot exist when there is an enforceable agreement between parties."); *Halstead v. Motorcycle Safety Found.*, 71 F. Supp. 2d 455, 459 (E.D. Pa. 1999) (unjust enrichment not available in presence of express contract); *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 454 (5th Cir. 2001) ("In Texas, unjust enrichment . . . is unavailable when a valid, express contract governing the subject matter of the dispute exists"); *Bright v. QSP, Inc.*, 20 F.3d 1300, 1306 (4th Cir. 1994) (applying West Virginia law and holding plaintiffs could not recover for unjust enrichment "in the face of an express contract").

Plaintiffs allege the existence of a written warranty covering their vehicles (even if not viable or not properly pled). *See* Compl. ¶¶ 83-86. Unjust enrichment is not available where a written vehicle warranty exists. *See, e.g.*, *Zarrella*, 755 F. Supp. 2d at 1227; *Rivera*, 2017 WL 3485815, at *6-7 (unjust enrichment claim precluded under Florida law where the complaint alleged breach of express warranty); *In re Gen. Motors Corp.*, 385 F. Supp. 2d 1172, 1176 (W.D. Okla. 2005) (applying Texas law) (unjust enrichment precluded where the complaint alleged, and the parties did not dispute, "the existence of an express warranty to repair any vehicle defect").

Finally, plaintiffs cannot pursue the equitable remedy of unjust enrichment because they

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[11] *Baxter v. PNC Bank Nat'l Ass'n*, 541 F. App'x 395, 397 n.2 (5th Cir. 2013) (applying Texas law); *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App. 2002) ("[U]njust enrichment is not a distinct independent cause of action but simply a theory of recovery"); *Pappalardo v. Combat Sports, Inc*., 2011 WL 6756949, at *11-12 (D.N.J. Dec. 23, 2011) ("New Jersey law does not recognize unjust enrichment as an independent tort cause of action"); *Warma Witter Kreisler, Inc. v. Samsung Elecs. Am., Inc.*, 2009 WL 4730187, at *7 (D.N.J. Dec. 3, 2009) (same). Plaintiffs lack standing, but their unjust enrichment claims are also barred in states where unjust enrichment is not an independent cause of action under state law. *See, e.g.*, *Melchior v. New Line Prods., Inc.*, 131 Cal. Rptr. 2d 347, 357 (Cal. Ct. App. 2003) (California law); *Cole v. Chevron USA, Inc*., 554 F. Supp. 2d 655, 671 (S.D. Miss. 2007) (Mississippi law); *Martis v. Grinnell Mut. Reinsurance Co.,* 905 N.E.2d 920, 927-28 (Ill. App. Ct. 2009) (Illinois law).

have an adequate legal remedy. [12] *See Am. Honda Motor Co., Inc. v. Motorcycle Info. Network, Inc.*, 390 F. Supp. 2d 1170, 1178 (M.D. Fla. 2005) ("in Florida…unjust enrichment is an equitable remedy and is, therefore, not available where there is an adequate legal remedy"). [13] An adequate legal remedy exists where a cause of action could address the alleged conduct if the conduct was unlawful. *Id.* (noting that the "quasi contract claim is predicated on the same set of allegations supporting the[] claims under FUTSA and FDUTPA"). This bar applies regardless of whether the plaintiff states a legally sufficient claim for that remedy. *Jovine v. Abbott Laboratories Inc.*, 795 F. Supp. 2d 1331, 1341 (S.D. Fla. 2011). The conduct underlying plaintiffs' unjust enrichment claims is identical to the conduct underlying their consumer fraud, fraudulent concealment, and warranty claims.

CONCLUSION

For the foregoing reasons, GM respectfully requests dismissal of all of plaintiffs' claims.

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[12] Unjust enrichment seeks the disgorgement of property or money given by one party directly to another. Here, plaintiffs purchased their vehicles from independent dealers and paid those dealers the separately negotiated purchase price. Plaintiffs paid no money directly to GM and therefore there is nothing for GM to disgorge. *See*, *e.g. Snyder v. Farnam Companies, Inc.*, 792 F. Supp. 2d 712, 724 (D.N.J. 2011) (dismissing unjust enrichment claim where "Plaintiffs… failed to allege that they purchased the Products directly from Defendants" because "they never directly conferred a benefit on Defendants").

[13] This limitation on unjust enrichment claims also applies in other states where plaintiffs lack standing. *See Cmty. Guardian Bank v. Hamlin*, 898 P.2d 1005, 1008 (Ariz. Ct. App. 1995); *Fernandes v. Havkin*, 731 F. Supp. 2d 103, 122 (D. Mass. 2010); *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.,* 493 N.W.2d 137, 140 (Minn. 1992); *N. Cheyenne Tribe v. Roman Catholic Church ex rel. Dioceses of Great Falls/Billings,* 296 P.3d 450, 457 (Mont. 2013); *E. Elec. Corp. v. FERD Canst., Inc.,* No. 05-cv-303, 2005 U.S. Dist. LEXIS 33256, at *5 (D.N.H. Dec. 15, 2005); *Samiento v. World Yacht Inc*., 883 N.E.2d 990, 996 (N.Y. 2008); *Rindal v. Sohler*, 658 N.W.2d 769, 772 (S.D. 2003); *Furlough v. Spherion Atl. Workforce, LLC,* 397 S.W.3d 114, 134 (Tenn. 2013); *VCS, Inc. v. Utah Cmty. Bank*, 293 P.3d 290, 299 & n.16 (Utah 2012). There are related reasons to dismiss plaintiffs' unjust enrichment claims on behalf of putative classes in states where they lack standing, such as the absence of a duty to disclose. *See, e.g.*, *Martis v. Grinnell Mut. Reinsurance Co*., 905 N.E.2d 920, 928 (Ill. App. Ct. 2009) ("[f]or a cause of action based on a theory of unjust enrichment to exist, there must be an independent basis that establishes a duty on the part of the defendant to act"); *Pitts v. Jackson Nat'l Life Ins. Co*., 574 S.E. 2d 503, 512 (S.C. Ct. App. 2002) ("[Plaintiff] failed to establish any duty to disclose or other cause of action that would allow recovery for unjust enrichment").

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Respectfully submitted,

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REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b), GM respectfully requests a hearing on this motion. Oral argument will benefit the Court because this motion raises important questions about standing in putative class action cases, personal jurisdiction over the claims of non-resident plaintiffs under the Supreme Court's recent decision in *Bristol-Myers Squibb v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017), and plaintiffs' pleading obligations in federal court. GM estimates that one hour should be sufficient time for oral argument.